

**National Recycling, Inc. and Local 200-D, Service
Employees' International Union, AFL-CIO.
Case 3-CA-16470**

March 11, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On October 30, 1991, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent, National Recycling, Inc., has violated Section 8(a)(5) and (1) of the National Labor Relations Act. On January 13, 1992, the Respondent filed an answer, dated December 13, 1991, admitting in part and denying in part the allegations of the complaint, and submitting an affirmative defense.

The complaint alleges, inter alia, that the Union is the exclusive representative of a unit of the Respondent's employees, and that the Respondent and Union were bound to a collective-bargaining agreement covering these employees from January 1, 1989, until December 31, 1991. The complaint further alleges that the Respondent has failed, since about January 22, 1991, to abide by this collective-bargaining agreement. Specifically, the complaint alleges that the Respondent failed to comply with the wage, vacation, health and welfare, and remittance of payment provisions of the contract.

In its answer the Respondent admits these allegations. It denies, however, that it has violated the Act. The Respondent pleads as an affirmative defense that it has "ceased operations and has no assets to meet its financial obligations."

On January 12, 1992, the General Counsel filed a motion to strike the Respondent's affirmative defense and for summary judgment. On January 27, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer, the Respondent admits that it has failed to abide by the terms of its collective-bargaining agreement concerning wages, vacations, health and welfare, and remittance of payments. It is well settled that Section 8(a)(5) and (1) of the Act, as explained in Section 8(d), prohibit an employer that is party to an existing collective-bargaining agreement from modifying the terms and

conditions of that agreement without prior union consent. *Nestle Co.*, 251 NLRB 1023 (1980). Here the Respondent has admitted all of the facts material to the resolution of the unfair labor practice issues raised by the complaint. The Respondent's assertion, that it is financially unable to satisfy its obligations and has ceased operations, essentially repudiates its statutory and contractual obligations and is not an adequate defense to the 8(a)(5) and (1) allegations. *O. W. Hubbell & Sons, Inc.*, 305 NLRB No. 138 (Dec. 23, 1991).

Because we find the Respondent's affirmative defense inadequate, we grant the General Counsel's motion to strike. Because there are no material facts in dispute, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, with its principal office and a place of business in Marlboro, New York, is engaged in the paper recycling business. During the year ending October 30, 1991, the Respondent derived gross revenues in excess of \$50,000 from other enterprises, including International Business Machine, which are directly engaged in interstate commerce. During the same period, the Respondent shipped and sold goods and materials valued in excess of \$50,000, directly to points located outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by National Recycling, Inc. out of its Marlboro, New York facility; excluding all office clerical employees, guards and supervisors as defined in the Act.

At all relevant times, the Union, by virtue of Section 9(a) of the Act, has been the exclusive representative of employees in this unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. Recognition has been embodied in successive collective-bargain-

ing agreements, the most recent of which was effective from January 1, 1989, until December 31, 1991.

Since about January 22, 1991, the Respondent has failed to continue in full force and effect all the terms and conditions of the 1989-1991 agreement by failing to abide by the following provisions:

- Article 4 (Welfare Fund)
- Article 5 (Pension Fund)
- Article 6 (Vacations)
- Article 8 (Remittance of Payments)
- Appendix B (Wages)

The terms and conditions of employment contained in these contractual provisions are mandatory subjects of bargaining.

By failing to continue in full force and effect all the terms and conditions of the 1989-1991 collective-bargaining agreement the Respondent has unlawfully failed and refused, and is failing and refusing, to bargain in good faith with the Union as the representative of its employees, in violation of Section 8(a)(5) and (1), as explained in Section 8(d), of the Act.

CONCLUSIONS OF LAW

By failing to abide with the contract provisions described above, the Respondent has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to give full force and effect to the terms and conditions of employment contained in its collective-bargaining agreement with the Union as the representative of its unit employees. Because the complaint does not specify the manner in which the Respondent failed to comply with the contractual wage, vacation, welfare fund, pension fund, and remittance of payment provisions, we shall leave to compliance the task of determining the make-whole remedy for each contract violation. *O. W. Hubbel & Sons, Inc.*, 305 NLRB No. 138, slip op. at 8 fn. 2 (Dec. 23, 1991).¹ Because the Respondent claims

¹ To the extent it is determined in compliance that unit employees suffered losses as a result of the Respondent's failure to adhere to the terms of the contract, they are to be made whole, with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, if unit employees incurred expenses or lost benefits because the Respondent failed to make welfare or pension payments, they are to be made whole in the manner prescribed in *Kraft Plumbing &*

that it has ceased operations, we shall order it to mail as well as post notices.

ORDER

The National Labor Relations Board orders that the Respondent, National Recycling, Inc., Marlboro, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instituting unilateral changes in contractual terms and conditions of employment of unit employees without first notifying and bargaining to agreement with the Union during the term of the parties' collective-bargaining agreement.

(b) Refusing to bargain collectively with Local 200-D, Service Employees' International Union, AFL-CIO, concerning rates of pay, wages, hours, and other terms and conditions of employment in the following appropriate unit:

All employees employed by National Recycling, Inc. out of its Marlboro, New York facility; excluding all office clerical employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Continue in full force and effect all the terms and conditions of employment contained in the following portions of its agreement:

- Article 4 (Welfare Fund)
- Article 5 (Pension Fund)
- Article 6 (Vacations)
- Article 8 (Remittance of payments)
- Appendix B (Wages)

(b) Make whole unit employees for any losses suffered as a result of the Respondent's failure to abide by the terms of its collective-bargaining agreement with the Union, including making required payments to the pension and welfare funds, in the manner described in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, trust fund statements, and all other records neces-

Heating, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981). Finally, amounts owing to the benefit funds, if any, shall be computed in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

sary to analyze the amount of backpay and benefits due under the terms of this Order.

(d) Post at its facility in Marlboro, New York, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Copies of the notice also shall be mailed to employees employed on or after January 22, 1991, at their last known addresses.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and had ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Local 200-D, Service Employees' International Union, AFL-CIO, concerning rates of pay, wages, hours, and other terms and conditions of employment in the following appropriate unit:

All employees employed by National Recycling, Inc. out of its Marlboro, New York facility; excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT institute unilateral changes in contractual terms and conditions of employment without first notifying and bargaining to agreement with the Union during the term of our collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL continue in full force and effect all of the terms and conditions of employment contained in the following provisions of the 1989-1991 agreement:

Article 4 (Welfare Fund)
Article 5 (Pension Fund)
Article 6 (Vacations)
Article 8 (Remittance of Payments)
Appendix B (Wages)

WE WILL make whole all present and former employees in the unit for any expenses or losses they suffered as a result of our failure to comply with the above provisions of the collective-bargaining agreement, with interest.

WE WILL remit to the welfare and pension funds any fringe benefit contributions that we may owe on behalf of employees in the unit.

NATIONAL RECYCLING, INC.